No. 92-852

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

SYLVESTER BISHOP

PETITIONER/APPELLANT

V.

SOUTHRAIL CORPORATION AND

MIDSOUTH CORPORATION

RESPONDANTS/APPELLEES

PETITION FOR WRIT FOR CERTIORARI FROM

SUPREME COURT OF ALABAMA

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205 333-1999

QUESTIONS PRESENTED FOR REVIEW

I. Whether Petitioner, Mr. Bishop's [Plaintiff/Appellant below] constitutuional rights of due process under the 5th and 14th Amendments to the U.S. Constitutuion were violated due to his eye being punched out by railroad [SouthRail and MidSouth Corp.] employee and thus also violated his due process rights to have a trial in the courts when the highest court of the state, the Supreme Court of Alabama, ignored its own procedure rules [Rule 12, Alabama Rules of Civil Procedure, and Rule 8], when there can be no res judicata when no answer was actually filed in the state court, and a late answer was filed in the federal court and the federal court did not accept jurisdiction of the state claim of FELA and therefore, the res judicata claim was moot, and the Supreme Court of Alabama failed to rule according to its own rules of the court and impinged on the constitutional

rights of Mr. Bishop to have due process in the court when his eye was punched out?

II. Whether the constitutuional rights of Mr. Bishop of due process under the 5th and 14th Amendments to the U.S. Constitution were further violated since Mr. Bishop has never received his day in court, when the Supreme Court of Alabama failed to follow own law on res judicats as seen in International Longshoremen's Association v. Davis, 470 So. 2d 1215 (Ala. 1985); Internat-Longshoremen's Association v. Davis, 476 U.S. 280, 90 L. Ed. 2d 389, 106 S. Ct 1904 (1986), concerning affirmative defenses, and in this particular case, there was no res judicata since no answer was filed in the state court, and the answer that was filed in the federal court was not timely filed, which means no res judicata?

PARTIES TO THE PROCEEDING

Sylvester Bishop, Petitioner [Appellant and Plaintiff below]; The following are respondants and defendants and Appellees below: SouthRail Corporation and MidSouth Corporation, both railroad companies. SouthRail is a subsidiary of MidSouth Corporation.

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OPINIONS BELOW

The Petitioner/Appellant incorporates all of the statements in the Opinions below, and are stated in the Appendix of this Writ of Certiorari and incorporated as "Opinions below". The opinion of the Supreme Court of Alabama is dated January 31, 1992, and the Rehearing was denied on February 28, 1992, and the opinion is reprinted in the appendix.

JURISDICTION

The Judgment of the Supreme Court of Alabama, of which review and reversal are sought, has jurisdiction under title 28, United States Code, Section 1257 (3).

Constitutional Provisions involved are:

Amendment XIV of the Constitution of the United States provides, in part, as follows:

"... no state shall make or enforce any law which shall... deprive any person of ... property without due process of law..."; nor deny to any person within its jurisdiction the equal protection of the laws."

Also, jurisdiction of this Court is invoked under U.S. Constitution, Amendment V, "no person shall ... be deprived of life, liberty or property, without due process of law;"

STATEMENT OF THE CASE

The instant case is now whether Mr. Bishop's consitutuional rights under the 5th

and 14th amendments to the U.S. Constitution has been violated by state alleged procedural rules when no answer or affirmative defense was filed in the state court. In other words, Mr. Bishop had a right that his eye not be punched out by a railroad employee to be heard in a court, and because his skull was also fractured Mr. Bishop was unable to represent himself in the first case, and unable to timely find an attorney that would take him since he was made an indigent because his eye was puched out when the railroad company fired both the agressor, Mr. Townsend, and the victim, Mr. Bishop. The point is whether Mr. Bishop is receiving due process in the courts which is a violation of his 5th and 14th Amendments to the U.S. Constitution, and triggers in the 42 U.S.C. § 1983 civil rights claim.

The Appellees clearly waived any alleged affirmative defense [res judicata not affirmatively raised] by the late filing of answer in the federal court [no filing of answer in state court] but the federal court never accepted jurisdiction of the FELA Claim, so any filing of the federal court of any answer was a nullity.

The bottom line there was no res judicata since Appellees failed to timely file an Answer in the federal court (20 days instead of 30 from Summons and Complaint) and the main point is the federal court did not accept jurisdiction to remove FELA issue in instant case and remanded FELA claim to state court and federal court did not accept jurisdiction of the FELA issue in instant case and remanded FELA claim to state court.

It was physically impossible because of punched eye out [see pictures in record exhibits taken by homicide and public records for criminal trial in which Mr. Bishop was victim, and the agressor, Mr. Townsend was found guilty of Assault III by th jury] for Mr. Bishop to find a lawyer or represent himself in 15 days in first case.

It was mentally impossible because of fractured skull as stated in medical records for Mr. Bishop to find an attorney in 15 days or be-pro se in the first case. The second case was timely filed, and the Appellees failed to timely file any affirmative defense, and filed no answer in the state court after remand.

Case Action summary sheets are in Vol.I, pp. 162-173, and on p. 172, granted summary judgment because of res judicata on January

11, 1991, which was plain error, prejudicial error, and reversible error since the Defendants/Appellees failed to file any type of answer in the Circuit Court of Tuscaloosa County. There is no res judicata for any reason when the Defendants/Appellees waived their right to any affirmative defense by not filing any type of answer in the Circuit Court of Tuscaloosa County for over (60) days since the remand order June 1, 1990 (Vol. I, p. 42).

The medical records clearly showed [Vol. I, pp. 79-84, that Mr. Bishop was injured in his left eye with a steel bar and had factured bone, and that the vision to his left eye is permanently loss.

The answer that was filed in the federal court was late [filed May 4, 1990, and in federal court supposed to be filed 20 days from date of Complaint which was

in instant case April 5, 1990]; therefore, the Appelles by law waived their right to any affirmative defense, and therefore, any granting of summary judgment on the issue of res judicata is reversible error especially since the Supreme Court of Alabama did not follow own law -- see International Longshoremen's Association v. Davis, 470 So. 2d 1215 (Ala. 1985); International Longshoremen's Association v. Davis, 476 U.S. 280, 90 L. Ed 2d 389, 106 So. Ct 1904 (1986), which held that affirmative defenses were to be deemed waived if not affirmatively pleaded. Therefore, what happened in the first case had absolutely nothing to do with what happened in the second case, and the Supreme Court made reversible error because failed to follow own law in International Longshoremen's Association case.

As a general rule, affirmative defense is waived if it is not timely pleaded. Rules Civ. Proc. Rule 8. See Blase v. Blase, Ala. Civ. App. 419 So. 2d 599 at 600 (1982).

STATEMENT OF THE FACTS

The underlying case to this Writ for Certiorari because of the violation of the due process rights of Mr. Bishop in the courts, which is a violation of his 5th and 14th Amendments to the U.S. Constitution, is a Federal Employees Liability Act case, which was removed to the federal court, the Honorable U.S. District court, Northern District of Alabama, by the Defendants/Appellees and was remanded to the state court without taking jurisdiction as to the Federal Employees Liability Act. [Vol. I,p,42].

Only the Complaint was filed in the state court, the Honorable Circuit Court of Tuscaloosa County, before the Defendants/Appellees removed the instant

case to the federal court. [Complaint, Vol. I, p. 5].

Mr. Bishop had his eye punched out causing him to lose his ability to see in his left eye. Pictures in record showed extensive damage to the eye. The medical records also shoed skull fracture damage. Mr. Bishop was working for SouthRail and MidSouth when a co-employee, Mr. Erwin Townsend, who was working in his line and scope of his duty, and was repairing a machine known as a transloader that Mr. Bishop did his work on. Mr. Townsend used a machinist bar which he was using in his line and scope of his work to punch Mr. Bishop's eye out, and said machinist bar is like a big crowbar.

In the criminal case, Mr. Townsend was found guilty by the jury that he punched Mr. Bishop's eye out and was known as Assault III.

It was clearly prejudicial error for the Honorable Judge of the lower court to allow an answer attached to another pleading to be the answer to stand in the instant case when said answer was not filed in the proper court, but was filed late in the federal court. [Vol. II, R17, lines 19-23).

Since SouthRail et al., failed to file any answer before removal no answer came back to state court, only the original complaint.

The alleged res judicata defense is MOOT, because there was a late filing of the answer in any court regardless whether filed as Answer May 4, 1990, in federal court, and in fact there never was an answer filed in the state court.

Writ for Certiorari should be granted, and the merits brief allowed to be written since the instant case should be remanded

and reversed since the issue of res judicata is waived, and the instant case should be tried on the merits of case by jury since disputable facts as to whether Mr. Townsend was acting within the line and scope of his employment.

REASON FOR GRANTING WRIT OF CERTIORARI[1]

The point is the instant case was refiled within the statute of limitations and therefore, there was no res judicata. Clearly, there is no res judicata in the instant case because the defendants failed to timely file in the state court their answer [no filing in state court] and have failed to particularly plead res judicata timely in any court. The filing in the federal a court, was untimely, and the federal court did not accept jurisdiction of the FELA claim, but remanded to the state court.

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[1]Note that Questions I and II discussed together.

See Deerfield Medical Center v. City of Deerfield Beach, 661 Fed. 2d 328 at 336 (5th Cir., 1981), which states,

"...The application of an improper legal standard in detemrining the likelihood of success on the merits is never within the district court's discretion."...

See Swendsen v. Gross, 530 So. 2d 764 (Ala. 1988) at 765, states,

"Mere general denial of liability, without more does not entitle movant to summary judgment as matter of law. Rules Civ. Proc., Rule 56.

See Riddlesprigger v. Ervin, 519 So. 2d 486 (Ala. 1987), which stated,

"Practical effect of dismissal without prejudice for want of prosecution was dismissal with prejudice where statute of limitations had expired."

There was no res judicata as stated under any Rule 41(b), because the defendants [now respondants] failed to

timely plead affirmative defenses in the state court.

The Supreme Court of Alabama failed to follow own law concerning affirmative defenses. See International Longshoremen's Association v. Davis, 470 So. 2d 1215 (Ala. 1985), International Long shoremen's Association v. Davis, 476 U.S. 280, 90 L. Ed. 2d 389, 106 S. Ct 1904 (1986). Also see Blase v. Blase, Ala. Civ. App., 419 So. 2d 599 at 600 (1982).

Clearly, there is no res judicata in the instant case, because the defendants failed to timely file an answer in the state court, and the federal court accepted no jurisdiction of the case making any filing in the federal court a nullity concerning the answer untimely filed in the federal court. JURISDICTION IS NOT DISCRETIONARY, AND SUMMARY JUDGMENT IS NOT DISCRETIONARY. See Hightower & Co.,

U.S. Fidelity & Guar. 527 So. 2d 698 at 699 Ala. 1988), which states,

"Granting Summary judgment is non-discretionary function of trial court and no presumption of correctness attaches to such decision upon appellate review. Rules Civ. Proc., Rule 56 (c)."

If the Writ for Certiorari is granted, then a merits brief is requested to be allowed to write concerning the employee who is working in the line and scope of his jog. See Brooks v. Washington Terminal Co., 593 F. 2d 1285, (1979). Also, see Jamison v. Encarnacion, 281 U.S. 635, 50 S. Ct 440, 74 L. Ed 1082, (1930).

The summary judgment should be denied as to res judicata and because clearly there are disputed facts as to whether Mr. Townsend was acting within the line and scope of his authority, which would trigger in the respondeant superior liability theory for intentional torts.

See Jones v. Alabama State Docks, 443 So. 2d 902 at 903, (Ala. 1983), which states,

"Due process clause of State Constitution secures every citizen against arbitrary action of those in authority and places him or her within protection of law of the land. Const § 13.

See Owens v. Okure, 57 LW 4065, which states,

"...We explained that the Civil Rights Acts provided: "[a] unique remedy making it appropriate to accord the statute a sweep as broad as its language.' Because of the § 1983 remedy is one that can 'override certain kinds of state law.' "Monroe v. Pape, 365 U.S. 167, 173, (1961), and is, in all events, 'supplementary to any remedy any State might have..."

See Standard Oil Co. V. Graves, Wash. 1919, 49 S. Ct 320, 249 U.S. 389, 63 L. Ed. 662, which states,

"While the Supreme Court follows the decision of the highest state court as to the meaning of a state statute which asserted to violate the Federal Constitution, the name given to the statute is not conclusive, and it must be judged by its necessary effect, and if that is to violate the Constitution of the United States the law must be declared void." (Emphasis added.)

Mr. Bishop's 5th and 14th Amendment rights to due process in the courts under the U.S. Constitution are being violated because of an alleged procedural rule on res judicata when the Supreme Court of Alabama failed to follow own law on res judicata as stated above in the International Longeshoremen's Association case.

Writ of Certiorari should be granted and the merits brief allowed to be written. There is no res judicata defense in the instant case since waived by not filing in the state court.

According to Minessota Mining & Manufacturing Co. v. Eco Chem. Inc. 757 F. 2d 1256 (U.S. Court of Appeals, Federal Cir. 1985), it was error not to have granted a summary judgment when a black victim, Mr. Bishop had his eye punched out by a white aggressor, Mr. Townsend, and the railroad company fired both the victim and the aggressor, and did not even pay Mr. Bishop's medical expenses, and has paid no compensation to Mr. Bishop for his eye being punched out while Mr. Bishop was working for the railroad.

See Argo v. Commissioner of Internal Revenue 150 F. 2d 67, on res judicata states,

"Controlling facts of identity for purposes of res judicata must be clearly shown and cannot rest upon mere assertion or speculation."

See Booth v. United Services Auto

Association, 469 So. 2d 1281 (Ala. 1985) for the elements of summary judgment.

CONCLUSION

Writ of Certiorari should be granted because there was no affirmative defense of res judicata when defendants/respondants failed to file an answer in the state court, and failed to timely file as to the particularity of an affirmative defense in any court.

The instant case should be reversed and remanded because the issue of res judicata is moot in the instant case, with instructions to try all triable issues by jury to include line and scope of duty of co-employee who punched Mr. Bishop's eye with a machinist bar causing him to lose his vision permanently, and fractured his skull causing permanent damage to his body for life for which the railroad companies should pay compensation, costs, and attorney fees.

Respectively submitted,

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205 333-1999

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the above was sent by U.S.mail to Mr. Steven F. Casey, Balch & Bingham, P.O. Box 306, Birmingham, Ala., 35201, and Mr. Robert H. Weaver, Watkins, Ludham & Stennis, 633 North State Street, P.O. Box 427, Jackson, Mississippi 39205 this 23 day of May 1992.

Julia Asam

APPENDIX A

SUPREME COURT OF ALABAMA

October Term, 1991-92

1901101

SYLVESTER BISHOP

V.

SOUTHRAIL CORPORATION AND MIDSOUTH CORPORATION

Appeal from Tuscaloosa Circuit Court

(CV-90-373.01)

ALMON, JUSTICE.

This appeal is from a summary judgment for the defendants in an action filed under the Federal Employers' Liability Act ("the FELA"). The summary judgment was entered on the basis of res judicata, but the plaintiff argues that the defendants had not filed an answer and so had not raised the affirmative defense of res judicata.

Sylvester Bishop filed this action against SouthRail Corporation, MidSouth Corporation, and Erwin Townsend, alleging

that, while Bishop and Townsend were employees of SouthRail, Townsend had hit Bishop in the eye with a metal rod and destroyed his eye.[1] The complaint included several other counts in addition to the FELA count. SouthRail and Midsouth filed a notice of removal to the United States District Court for the Northern District of Alabama. In the federal court, these defendants filed copies of a complaint that Bishop had filed against them in that same federal court 20 months earlier; that earlier complaint had sought damages under the FELA for the same assault. The defendants also filed copies of a judgment dismissing, for lack of prosecution, that prior federal action, and an order by the Eleventh Circuit Court of Appeals dismissing,

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[1]SouthRail is a subsidiary of MidSouth. Townsend was convicted of assault as a result of this incident.

as untimely, an appeal from the district court's dismissal of that action.

Bishop filed in the federal court a motion to strike all counts of his present complaint except the FELA count and to remand the cause to the Circuit Court of Tuscaloosa County. The next day, SouthRail and MidSouth filed in the federal court an answer to the complaint. Shortly, thereafter, the federal court granted the motion to strike all counts except the FELA count and remanded the action. After the case was remanded, Bishop filed a motion for default judgment, alleging that SouthRail and MidSouth had not filed an answer.[2] They filed a motion in opposition to the motion for default judgment, attaching a copy of the answer they had filed in the federal court. The answer

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[2]In the response to a motion by defendant Townsend, the circuit court held that the striking of all counts except the FELA

included a defense of res judicata.

The trial court denied Bishop's motion for a default judgment, and SouthRail and MidSouth filed a motion for summary judgment, including the ground that this

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count worked as a dismissal of the complaint against Townsend, and entered an order dismissing Townsend as a defendant.

[3]The facts stated are sufficient to show that Bishop's argument that SouthRail and MidSouth did not effectively raise the defense of res judicata has no merit. See, e.g., Teamsters Local 515 v. Roadbuilders, Inc., 249 Ga. 418, 291 S.E. 2d 698 (1982); Marlow v. Mid South Tool Co., 535 So. 2d 120 (Ala. 1988).

action was barred by res judicata. The trail court entered a summary judgment on that basis.

The judgment is due to be affirmed on the authority of Combs v. Alabama Gas Corp., 577 So. 2d 1269 (Ala. 1991), and Higgins v. Henderson, 551 So.2d 1050 (Ala. 1989). The one difference between this case and Higgins is that the dismissal in Higgins was for a failure to state a claim. That difference does not affect the outcome.

"The elements of res judicata are as follows: (L) prior judgment rendered by court of competent jurisdiction; (2) prior judgment rendered on the merits (3) parties to both suits substantially identical; and (4) same cause of action present in both suits."
Wheeler v. First Alabama Bank of Birmingham, 364 So. 2d 1190, 1199 (Ala. 1978); Ferguson v. Commercial Bank, 578 So. 2d 1234 (Ala. 1991). A dismissal for

failure to prosecute is a judgment on the merits unless the order of dismissal states otherwise. Rule 41(b), Ala. R. Civ. P.; Rule 41(b), Fed. R. Civ. P.; Penn v. Irby, 496 So. 2d 751 (Ala. 1986); Selby v. Money, 403 So. 2d 218 (Ala. 1981); State v. Horton, 373 So. 2d 1096 (Ala. 1979).

AFFIRMED. [Jan. 31, 1992].

Maddox, Adams, Steagall, and Ingram, JJ. concur.

APPENDIX B

SUPREME COURT OF ALABAMA

October Term, 1991-92

1901101

SYLVESTER BISHOP

V.

SOUTHRAIL CORPORATION AND MIDSOUTH CORPORATION

Appeal from Tuscaloosa Circuit Court

(CV-90-373.01)

Application for Rehearing overruled. No opinion written on rehearing.

Almon, Maddox, Adams, Steagall, and Ingram, JJ. concur.

2/28/92

s/ Robert G. Esdale

Robert G. Esdale, Clerk

Supreme Court of Alabama

APPENDIX C

IN THE CIRCUIT COURT OF TUSCALOOSA COUNTY

SYLVESTER BISHOP

Plaintiff

v.

SOUTHRAIL CORP. AND MIDSOUTH CORPORATION.

Defendants

Case no. 373.01

ORDER DATED January 11, 1991

Defendant Motion for Summary Judgment granted on the ground of res judicata. Costs taxed to Plaintiff.

/s/ Thomas S. Wilson

Circuit Judge